Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Motion of Lucent Technologies Inc.	)	WC Docket No. 02-147
For a Declaratory Ruling	)	

Comments of Lucent Technologies Inc.

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I. Introduction and Summary

Lucent Technologies Inc. submits these comments in support of its petition for a declaratory ruling concluding that certain claims in a 30-million-plaintiff, nationwide class action lawsuit have been preempted. The class action challenges in state court under the guise of state consumer protection claims certain aspects of the FCC's *Second Computer Inquiry* which deregulated in the 1980s telephone equipment that AT&T (and subsequently Lucent)[1] leased to consumers at least eighteen years ago.[2] As Lucent explained in its *Third Supplement to Petition for Declaratory Ruling*,[3] the lawsuit—set for trial on August 5, 2002—conflicts with black-letter

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[1] AT&T operated the leasing business from 1984 to 1996 and spun it off to Lucent in 1996.

[2] *See In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Final Decision*, 77 FCC.2d 384 (1980) (CPE Final Decision), *recon.*, *Memorandum Opinion and Order*, 84 FCC.2d 50 (1980) (CPE Reconsideration Order), *further recon.*, *Memorandum Opinion and Order on Further Reconsideration*, 88 FCC.2d 512 (1981) (CPE Further Reconsideration Order); *In re* Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services (Second Computer Inquiry), *Report and Order*, 95 FCC.2d 1276 (1983) (CPE Implementation Order), *recon., Memorandum Opinion and Order on Reconsideration*, FCC 85-35, 1985 FCC LEXIS 3995 (rel. Jan. 29, 1985) (CPE Implementation Reconsideration Order).

[3] *In re* Motion of AT&T Corp. and Lucent Technologies Inc. for a Declaratory Ruling, WC Docket No. 02-147, *Lucent Technologies Inc.'s Third Supplement to Petition for Declaratory Ruling* (filed May 23, 2002) (Lucent's Third Supplement).

preemption law dictating that claims which conflict with federal policy may not be maintained in state court.

The lawsuit, which was not filed until 1996, notably has as its class only those "embedded-base" telephone subscribers[4] that the FCC specifically addressed from 1980 to 1985 in orders on the deregulation of customer premises equipment (CPE). In those orders, the FCC balanced the interests of: 1) "embedded-base" customers using legacy equipment; 2) current and future customers using "new" equipment; 3) carriers that sold CPE; 4) the shareholders of those carriers; 5) non-carrier vendors of CPE competing with those carriers; and 6) ratepayers for the underlying telephone services. Many—if not most—of these parties are not represented in the class action.

The class action challenges the FCC's longstanding conclusion that the competitive market protected those interests better than CPE regulation. The suit also attacks the FCC-required and ratified consumer-awareness program regarding CPE deregulation that the FCC determined would protect the interests of embedded-base customers, and others, during and after the transition to deregulation. The FCC exhaustively examined the CPE marketplace, specifically ruled on the appropriate treatment of embedded-base customers, and directed AT&T's conduct regarding the lease, sale, and marketing of CPE to those customers. Plaintiffs should not be allowed to ask a state trial court to second-guess the FCC's final orders deregulating CPE or the balance of interests that the FCC struck.

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[4] "Embedded-base" subscribers are subscribers that used or are using carrier-owned telephones provided to customers as part of their regulated telephone service. *See CPE Further Reconsideration Order*, 88 FCC.2d at 513 ¶ 3; *CPE Implementation Order*, 95 FCC.2d at 1279 n.5.

Now is the time for the FCC to act. Allowing the claims to go forward unjustly exposes Lucent to substantial potential liability for following and relying on FCC orders, disrupts the FCC's deregulatory regime for CPE, and casts uncertainty over the CPE market. The FCC has said in its orders deregulating CPE that it has preempted state action that is "at odds" with its deregulatory regime for CPE. In recent court filings and the discovery process, plaintiffs have narrowed and clarified their claims as well as the theories underlying them. In doing so, they have confirmed Lucent's earlier contentions that plaintiffs are attempting an end-run around the FCC's orders deregulating CPE.

The FCC can and should use this further-developed record, as set out below, to identify specifically those of plaintiffs' claims that are at odds with the FCC's deregulatory regime for CPE. In particular, the FCC should issue a declaratory ruling that the claims in the class action have been preempted to the extent that they: 1) contend that AT&T had special duties to embedded-base customers beyond those established by the FCC; 2) challenge the reasonableness of the market-based CPE rates of AT&T and Lucent following the transition to deregulation; and 3) allege that embedded-base customers were provided insufficient information to be reasonably aware of their status as CPE lease customers and of their options to buy CPE. Waiting to address these issues only runs the risk of burdening more of the FCC's scarce resources as this case and others like it proceed toward potential judgments that demand FCC intervention. At least six other state-court class actions on CPE-leasing issues have been filed.[5]

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[5] *See* Jackson v. Lucent Technologies, No. CV96-00163 (Ala. Cir. Ct., Greene County); Carey v. AT&T, No. CV96-2075. (Ala. Cir. Ct., Mobile County); Santone v. AT&T, Class Action 717114 (Cal. Super. Ct., San Diego County); Sparks v. Lucent Technologies, No. 01-L-1668 (Ill. Cir. Ct., Madison County); Katz v. AT&T Corp., No. L-1088-99 (N.J. Super. Ct., Somerset County); Boughner v. AT&T Corp, No. 99-020182 (N.Y. Sup. Ct., Nassau County).

Permitting this case to proceed could also jeopardize at this fragile time for the communications industry other matters governed by the FCC and set precedent that threatens the FCC's goal of maintaining uniform, national policies for the country's communications system. For instance, even if the FCC ultimately were to conclude in its pending proceedings that broadband services should be deregulated, plaintiffs twenty years from now could seek the retroactive re-regulation of the rates and terms for broadband services under the same pretext of invoking state consumer protection law.

Accordingly, the FCC should promptly issue the requested declaratory ruling concluding that all of plaintiffs' state-court claims which are at odds with the FCC's orders deregulating CPE have been preempted.

II. The FCC's Deregulation of Customer Premises Equipment

A. The Competitive CPE Market

Historically, the vast majority of residential subscribers leased their telephones as part of the regulated telephone service they received from the Bell System. The FCC began contemplating CPE deregulation in the late 1970s, however. The FCC solicited at least eight rounds of public comments and replies on CPE deregulation and numerous parties participated, including telecommunications carriers, CPE manufacturers, state regulators, consumer groups, and telecommunications subscribers.[6] The FCC exhaustively examined these filings and

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[6] The FCC received hundreds of filings from parties such as the Ad Hoc Telecommunications Users Committee, the Alaska Public Utilities Commission, the People of the State of California, the Public Utilities Commission of California, the Consumers Union, the D.C. Public Service Commission, the Citizens of the State of Florida, the Florida Public Service Commission, the Kansas Corporation Commission, the Michigan Public Service Commission Staff, the Minnesota Public Service Commission, the National Association of Regulatory Utility Commissioners, the New York Department of Public Service, the North Dakota Public Service Commission, the Virginia State Corporation Commission, and the Public Service Commission of

competitive developments in the CPE marketplace, culminating in a series of orders between 1980 and 1985.[7] The FCC concluded that there was "a strong viable market for equipment which assures users a wide range of competitive alternatives."[8]

In light of this abundant competition, the FCC determined that "[c]ontinued regulation of CPE [would] not foster a competitive equipment environment."[9] The FCC was "hard pressed to proffer any statutory or public interest justification for rate-regulation of carrier-provided CPE."[10] Indeed, continued regulation was not only unnecessary, the FCC said that it would be harmful because it would prevent carriers from responding competitively in the CPE market; keep carrier vendors' CPE rates artificially low, making it harder for non-carrier vendors to compete; and result in diminished competition and innovation.[11] Consequently, the FCC found

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Wisconsin. *See In re* Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), *Supplemental Notice and Enlargement of Proposed Rulemaking*, 64 FCC.2d 771 (1977); *Tentative Decision and Further Notice of Inquiry and Rulemaking*, 72 FCC.2d 358, 366 & n.15, App. A (1979); *CPE Reconsideration Order*, 84 FCC.2d at 50, 110-11; *CPE Further Reconsideration Order*, 88 FCC.2d at 512 & n.2; *CPE Implementation Notice of Inquiry*, 89 FCC.2d 694 (1982); *CPE Implementation Notice of Proposed Rulemaking*, 94 FCC.2d 76, ¶¶ 6-7 & nn.5, 8 (1983); *CPE Implementation Order*, 95 FCC.2d at ¶¶ 9, 11; *CPE Implementation Reconsideration Order*, 1985 FCC LEXIS 3995, at *99-100.

[7] *See CPE Final Decision*, 77 FCC.2d 384, *recon.*, *CPE Reconsideration Order*, 84 FCC.2d 50, *further recon.*, *CPE Further Reconsideration Order*, 88 FCC.2d 512; *CPE Implementation Order*, 95 FCC.2d 1276, *recon.*, *CPE Implementation Reconsideration Order*, 1985 FCC LEXIS 3995.

[8] *CPE Final Decision*, 77 FCC.2d at 453 ¶ 179. *See also id.* at 439-40 ¶¶ 141-43, 453 ¶ 179; *CPE Implementation Order*, 95 FCC.2d at 1298 ¶ 34, 1320-21 ¶ 69; Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198, 211 (D.C. Cir. 1982).

[9] *CPE Final Decision*, 77 FCC.2d at 441 ¶ 145.

[10] *Id.*

[11] *See id.* at 388 ¶ 9, 440-41 ¶¶ 143-45, 446 ¶¶ 158-59; *CPE Reconsideration Order*, 84 FCC.2d at 65 ¶ 46; *CPE Implementation Order*, 95 FCC.2d at 1280 ¶ 3, 1301 ¶ 38.

that competition would be better promoted, consumers would be better protected, and the public interest would be better served if CPE was not regulated.[12]

The FCC therefore determined that the provision of CPE was "a highly competitive activity [that] should no longer be regulated."[13] In fact, the FCC concluded that "given the degree of competition in this market some individualized negotiations among terminal equipment providers and customers [would] result in more vigorous and effective competition than ... when services are available only on a single schedule of charges."[14] The benefits would accrue to consumers and carriers alike. "For consumers, competition [would] bring a wider variety of choices, improved products, and better service. For carriers, the removal of regulation [would] enable them to compete in the CPE marketplace without being subject to the artificial restraints and restrictions which often accompany regulatory controls."[15] The FCC therefore determined that "the marketplace, and not governmental regulation, should control the activities of carriers in the provision of CPE."[16] Consequently, the FCC created a "federal regulatory scheme [that] essentially involves the removal of traditional utility type regulation over CPE."[17]

The FCC acknowledged that deregulation could lead to price changes—potentially up as well as down.[18] The FCC said there was nothing to fear from such deregulation, however,

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12 *See CPE Final Decision*, 77 FCC.2d at 455 n.69; *CPE Implementation Order*, 95 FCC.2d at 1392 ¶ 217.

13 *CPE Final Decision*, 77 FCC.2d at 452 ¶ 174.

14 *Id.* at 455 n.69.

15 *CPE Implementation Order*, 95 FCC.2d at 1392 ¶ 217.

16 *Id.* at 1301 ¶ 38. *See also id.* at 1318 ¶ 65.

17 *CPE Further Reconsideration Order*, 88 FCC.2d at 523 ¶ 33. *See also id.* at 541 n.34.

18 *See CPE Final Decision*, 77 FCC.2d at 449-50 ¶ 167 (stating that "some or all carrier-provided CPE may be currently overpriced or underpriced").

because "according broad discretion to carriers to raise or lower terminal equipment rates or to enter into individual contractual arrangements with individual customers is not likely to result in users being charged unreasonable or unreasonably discriminatory rates."[19] Indeed, the FCC said that "[t]here may be even less of a danger of unreasonable or unreasonably discriminatory rates when customers are in a position to 'comparison shop' among different suppliers."[20]

This rationale applied to both the sale and lease of CPE, as the FCC saw the two as one competitive market:

> [T]he competitive marketplace for residence CPE will act as a sufficient check upon sharp increases in lease rates by [AT&T]. Any such action by [AT&T] would risk losing in-place customers to a growing host of competitors in single-line equipment. The wide range of options currently available to customers ... makes it unlikely that [AT&T] would be in a position to impose unrealistically high lease rates.[21]

B. The Transition Plan

To ensure that the switch from a regulated environment to a deregulated environment went as smoothly as possible and that consumers' interests were protected, the FCC required AT&T to comply with an elaborate transition program.[22] The FCC bifurcated the transition, addressing the deregulation of "new" CPE separately from the deregulation of embedded CPE.[23] The FCC did so as a way of addressing concerns voiced by some parties that deregulation of CPE held by embedded-base customers warranted special consideration.[24]

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19 *Id.* at 455 ¶ 183.

20 *Id.* at 455 n.69. *See also CPE Implementation Order*, 95 FCC.2d at 1321-22 ¶ 70.

21 *CPE Implementation Order*, 95 FCC.2d at 1326 ¶ 79. *See also id.* at 1325 ¶ 77.

22 *See CPE Final Decision*, 77 FCC.2d at 448 ¶ 165.

23 *See CPE Reconsideration Order*, 84 FCC.2d at 66 ¶ 48-49.

24 *Id.* at 66 ¶ 48.

New CPE was to be deregulated on a "flash-cut" basis.[25] Embedded CPE was to be subject to a two-year transition period during which customers would continue to lease their telephones at regulated rates but be offered the option to buy telephones from AT&T or other vendors.[26] After the transition period, embedded CPE was to be deregulated, embedded-base customers were to be treated like all other customers, and AT&T was to charge market-based rates for the lease or sale of CPE.[27] The FCC specifically rejected requests to limit AT&T's rates for a longer period.[28]

The FCC instituted a special "implementation proceeding" to address the mechanics of the transition for embedded CPE.[29] In that proceeding, the FCC made extensive findings concerning the appropriate nature, scope, and duration of the regulatory requirements that would apply to AT&T's provision of CPE to embedded-base customers. The FCC-approved transition plan—a slightly modified version of a proposal made by AT&T—detailed, among other things: 1) the sale and lease options AT&T was to offer its embedded-base subscribers; 2) the default if a subscriber failed to indicate a choice between leasing and buying; and 3) the pricing of leased equipment during the transition.[30]

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25 *See id.* at 67 ¶ 49.

26 *See id.* at 67 ¶ 49 & n.13; *CPE Implementation Reconsideration Order*, 1985 FCC LEXIS 3995, at *5-8 ¶¶ 3-5, *12-16 ¶¶ 11-13, *23 ¶ 21.

27 *See CPE Reconsideration Order*, 84 FCC.2d at 67 ¶ 49 & n.13; *CPE Implementation Order*, 95 FCC.2d at 1298-99.

28 *See CPE Implementation Order*, 95 FCC.2d at 1300 ¶ 36, 1327-28 ¶ 81.

29 *See CPE Reconsideration Order*, 84 FCC.2d at 67 ¶ 49; *In re* Procedures for Implementing the Detariffing of Customer Premises Equipment, CC Docket No. 81-893, *Notice of Proposed Rulemaking*, 94 FCC.2d 76, ¶ 2 (1983).

30 *See, e.g., CPE Implementation Order*, 95 FCC.2d at 1319-1330 ¶¶ 67-85.

The FCC also prescribed the timing, form, and content of the notifications AT&T was obligated to supply embedded-base customers to help them choose whether to continue leasing their telephones, to buy those telephones, or to buy telephones on the open market. The FCC required that embedded-base customers "be notified shortly before detariffing that they have an option to purchase or to continue leasing their single-line CPE."[31] AT&T was also to tell customers that they might "also terminate lease service and obtain equipment from other vendors."[32] The FCC also required AT&T to inform customers that they need not obtain their telephones from AT&T to continue receiving telephone service from their current provider.[33]

AT&T was to "provide each embedded customer with a conspicuous, clear, and full written explanation that the Commission ha[d] required AT&T to provide the customer with all CPE-related information necessary or useful for facilitating the customer's opportunity to seek alternative providers of CPE."[34] The FCC required AT&T to poll its customers using a "modified negative option," whereby "[m]aterials included in [Bell Operating Company] bill inserts [would] request customers to choose between buying and leasing. ... [F]ailure by the customer to respond [would] be treated as a decision to continue leasing."[35]

AT&T was only obligated to provide consumers with additional "equipment information upon written notice" from a consumer.[36] The FCC directed AT&T to "respond to customer

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31 *CPE Implementation Order*, 95 FCC.2d at 1320 ¶ 67 (emphasis added). *See also id.* at 1352 n.107, App. B ¶¶ 1, 3, 22.

32 *Id.* at 1352 n.107. *See also id.* at App. B, ¶¶ 1, 22.

33 *Id.* at 1354 ¶ 131.

34 *Id.* at 1352 ¶ 125. *See also id.* at App. B, ¶¶ 1, 22.

35 *Id.* at 1320 ¶ 67. *See also id.* at App. B ¶¶ 1, 3.

36 *Id.* at 1352 ¶ 125 (emphasis added).

requests by providing all pertinent information which ordinarily would be used by an equipment vendor in planning the design of and charges for a proposed communications system for the customer."[37] To ensure that AT&T complied with the notification and other obligations, the FCC required AT&T to report periodically on its performance during the transition.[38]

The FCC determined that its consumer notification program, when combined with the FCC-approved, $12 million nationwide advertising campaign that AT&T launched in July 1983,[39] ensured that embedded customers could "make informed judgments from a full set of options," and "protecte[d] them against dislocations during and after the transition period."[40] Consequently, the FCC said AT&T would have no additional notice obligations going forward, that requiring additional notification would harm competition and innovation, and that the Commission would not grant requests by states and others for authority to require additional notices.[41]

In developing and implementing its transitional program for embedded CPE, the FCC balanced the interests of embedded-base customers using legacy equipment with the interests of other affected parties, including: 1) current and future customers using "new" equipment; 2) carriers that sold CPE; 3) the shareholders of carriers that sold CPE; 4) non-carrier vendors of CPE competing with carrier vendors; and 5) ratepayers for the underlying telephone service.[42]

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37 *Id.* at 1353 ¶ 128 (emphasis added).

38 *See id.* at 1321 ¶ 70, 1352-53 ¶ 126.

39 *Id.* at 1321 ¶ 69.

40 *Id.* at 1300 ¶ 36, 1321 ¶ 69.

41 *See CPE Final Decision*, 77 FCC.2d at 446 ¶ 158; *CPE Implementation Order*, 95 FCC.2d at 1302-05 ¶¶ 40-43.

42 *See CPE Implementation Order*, 95 FCC.2d at 1292 ¶ 21(5), 1318-19 ¶¶ 65-66; *CPE Implementation Reconsideration Order*, 1985 FCC LEXIS 3995, at *15-16 ¶ 13.

The Commission sought to ensure that CPE rates would be reasonable, that company investment and innovation in CPE would be encouraged and rewarded, that competition would accelerate, that carriers and stockholders received a fair return on the carriers' legacy and new CPE, that carrier CPE rates were not so low as to preclude competition from independent CPE manufacturers, and that carriers were not forced to raise consumer rates for telephone service to offset any drop in revenue from CPE rates or unnecessary costs attributed to the transition plan.[43]

The FCC concluded that its plan for embedded CPE was "the best means for achieving a transition to a completely deregulated CPE marketplace," and required AT&T to comply with the plan.[44] The FCC said that the plan it devised:

> offer[ed] ample protection to ratepayers and in-place customers, protect[ed] the development and expansion of competition in the CPE marketplace, extended to Bell System investors an opportunity to recover their investment in the transferred embedded base, and permit[ted AT&T] to join the ranks of unregulated CPE competitors without the imposition of unwarranted burdens and restraints.[45]

Because the FCC feared that states might upset the FCC's balance by imposing their own CPE obligations without considering the interests of all parties, the FCC expressly preempted state regulation that was "at odds" with its orders deregulating CPE.[46]

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[43] *See CPE Implementation Order*, 95 FCC.2d at 1292 ¶ 21(5), 1318-19 ¶¶ 65-66, 1392-93 ¶¶ 217-220; *CPE Implementation Reconsideration Order*, 1985 FCC LEXIS 3995, at *15-16 ¶ 13.

[44] *CPE Implementation Order*, 95 FCC.2d at 1291 ¶ 21(2), 1292 ¶ 21(6), 1321 ¶ 69.

[45] *Id.* at 1392-93 ¶ 218.

[46] *See CPE Reconsideration Order*, 84 FCC.2d at 103 ¶ 154; *Lucent's Third Supplement*, Exh. 4: FCC Amicus Memorandum, at 2-3 (FCC Amicus Memorandum); Illinois Bell Tel. Co. v. FCC, 883 F.2d 104, 106 (D.C. Cir. 1989) (explaining that to fulfill the federal deregulatory objective, the FCC exercised its ancillary authority over CPE to preempt inconsistent state regulation).

In responding to petitions for reconsideration of its *CPE Implementation Order*, the FCC reaffirmed its determinations regarding the embedded-base on essentially every material issue. The FCC stated that based upon its:

> extensive review of [the] petitions and of oppositions, comments, replies, and other filings made in this proceeding, that neither the basic principles nor the broad outline of the detariffing plan established in the Order is in need of any revision. We have found no reason to depart from our conclusion that the procedures and requirements established in the Order are the best means of implementing the objectives of the Second Computer Inquiry with regard to embedded CPE owned by AT&T."[47]

III. The Class Action

More than a decade after the FCC decided these matters, plaintiffs initiated this litigation in Illinois state court.[48] Plaintiffs' claim that AT&T owed embedded-base subscribers additional duties above and beyond those established by the FCC; that AT&T should not have been allowed to charge embedded-base customers market-based rates for CPE after the transition because the market was not competitive; and that the FCC-required and ratified consumer awareness campaign was insufficient to make embedded-base customers reasonably aware of their status as lease customers and of their options to terminate their leases and buy telephones. The Illinois trial court dismissed the complaint in March 1999 on the grounds that the FCC's orders deregulating CPE preempted plaintiffs' claims.[49] Plaintiffs filed a motion asking the court to reconsider that decision in April 1999.[50]

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47 *See CPE Implementation Reconsideration Order*, 1985 FCC LEXIS 3995, at *1-2 ¶ 1. *See also id.* at *11-16 ¶¶ 10-13.

48 *See Lucent's Third Supplement*, Exh. 1: Complaint.

49 *See id.*, Exh. 2: Dismissal Order, at 2-4 (Dismissal Order)

50 *See id.*, Exh. 3: Plaintiffs' Motion for Reconsideration (Reconsideration Motion).

While the trial court was contemplating the reconsideration motion, the FCC filed an *Amicus Memorandum*. In the *Memorandum*, the FCC emphasized that "it [took] no position on the merits of the claims, or even on whether the laws invoked by the plaintiffs apply to the sale or lease of CPE."[51] The agency explained that, although it had not intended to preempt all state contract and consumer protection law, it had preempted state law that is inconsistent with the FCC's deregulatory regime, such as utility-type regulation of CPE.[52] Upon the filing of the FCC *Amicus Memorandum*, AT&T and Lucent submitted a motion for declaratory ruling with the FCC seeking additional guidance on the preemptive scope of the orders deregulating CPE.[53] In the meantime, the Illinois trial court reinstated the complaint in July 1999.[54] The court apparently interpreted the FCC *Amicus Memorandum* to mean that any claims under color of state consumer protection law were not preempted.

Plaintiffs filed a *Third Amended Complaint* on Nov. 5, 2001, that limited the class to the embedded-base customers who were the subject of the FCC orders deregulating CPE and who benefited from the FCC-established transition plan for the embedded base.[55] In addition, from late 2001 to early 2002, plaintiffs detailed in reports and depositions the precise bases for their

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51 *FCC Amicus Memorandum*, at 3.

52 *Id.* at 2-3.

53 *See In re* Motion of AT&T Corp. and Lucent Technologies Inc. for a Declaratory Ruling, WC Docket No. 02-147, *Motion of AT&T Corp. and Lucent Technologies Inc. for Declaratory Ruling* (filed May 24, 1999).

54 *See* Exhibit 1: Reinstatement Order. The reinstatement was affirmed by an intermediate state appellate court. Crain v. Lucent Technologies, 739 N.E.2d 639 (Ill. App. Ct. 2000), *petition for leave to appeal denied*, 747 N.E.2d 352 (Ill. 2001). The FCC did not participate in the appeal.

55 *See Lucent's Third Supplement*, Exh. 6: Third Amended Complaint, at 2 ¶ 9 (Third Amended Complaint) (defining the class as only those customers who leased a phone

claims. The new submissions confirm that most of plaintiffs' claims challenge the FCC's decision to allow market-based lease rates for embedded CPE after the transition period, as well as the adequacy of the FCC-required and ratified consumer awareness program. In light of these developments, and having heard nothing from the FCC on its petition despite filing two supplements,[56] Lucent filed its *Third Supplement to Petition for Declaratory Ruling*.[57] The FCC issued a Public Notice on June 28, 2002, seeking comment on Lucent's *Third Supplement*.[58]

IV. Most of Plaintiffs' Claims Have Been Preempted

A. State Action at Odds with the FCC's Deregulatory Regime Is Preempted

The Communications Act of 1934, as amended, generally authorizes the FCC to regulate "interstate and foreign commerce in communication by wire and radio,"[59] including "all instrumentalities, facilities, [and] apparatus ... incidental to [the] transmission" of such communication.[60] The Act for the most part leaves to the states regulation of intrastate communication service.[61] As the U.S. Supreme Court has observed, however, "virtually all telephone plant that is used to provide intrastate service is also used to provide interstate service,

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from before January 1, 1984, through at least January 1, 1986, i.*e.* existing customers to whom AT&T was obligated to provide the FCC-required and ratified notifications).

56 AT&T and Lucent filed supplements on June 16, 1999, and December 10, 1999.

57 *See Lucent's Third Supplement*, at 1.

58 *See In re* Motion of AT&T Corp. and Lucent Technologies Inc. for a Declaratory Ruling, WC Docket No. 02-147, *Public Notice: Comments Sought on Lucent's Third Supplement*, DA 02-1533 (rel. June 28, 2002).

59 47 U.S.C. § 151. *See also* 47 U.S.C. § 152(a).

60 47 U.S.C. §§ 153(33), 153(52) (defining "radio communication" and "wire communication").

61 *See* 47 U.S.C. § 152(b).

and is thus conceivably within the jurisdiction of both state and federal authorities."[62] This certainly holds true for CPE, such as the telephone.

As a result of this dual jurisdiction, conflicts between federal and state regulation of CPE inevitably arise. Where state action regarding CPE conflicts with the FCC's authority, the Supremacy Clause of the Constitution preempts the state action.[63] According to the Supreme Court:

> [p]re-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.[64]

Thus, FCC regulation has the same preemptive effect as federal statutes. In the words of the FCC, "[t]he Commission may preempt state actions that are inconsistent with and would undermine federal policies and orders the Commission has adopted pursuant to its statutory authority."[65] Whether the state action comes in the form of a judicial proceeding is irrelevant. A decision by a state court is no less "regulatory state action" then were it made by a state public utility commission.[66]

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62 Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360 (1986).

63 *See id.*, 476 U.S. at 368.

64 *Id.*, 476 U.S. at 368-69 (citations omitted) (emphasis added).

65 *FCC Amicus Memorandum*, at 3.

66 *See In re* Wireless Consumers Alliance, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd. 17021, 17027 ¶ 12 & nn. 39-40 (2000) (citing Shelley v. Kraemer, 334 U.S. 1 (1948); BMW v. Gore, 517 U.S. 559, 572 n.17 (1996); San Diego Building Trades Council v.

In adopting its deregulatory regime for CPE, the FCC clearly acted within the scope of its congressionally delegated authority.[67] The FCC explained in its *Amicus Memorandum* that in exercising that authority "the Commission had to preempt some state regulation of CPE in order to make its deregulatory policy effective."[68] Indeed, in its orders deregulating CPE, the FCC said that it would preempt the states to the extent that state CPE regulation "is at odds with" the FCC's deregulatory regime.[69] In affirming the FCC's central determinations regarding the deregulation of CPE, the U.S. Court of Appeals for the D.C. Circuit concurred, concluding that "conflicting state regulations would impede the Commission in its effort to fulfill its statutory duty."[70] To ensure that it would not be so impeded, the FCC declared that it would assess "on an *ad hoc* basis" whether specific instances of state regulation over CPE are preempted.[71] As we explain in more detail in Part IV.B, such an *ad hoc* assessment indicates here that most of plaintiffs' claims are in fact "at odds with" the FCC's deregulatory regime, and are thus preempted.

Garmon, 359 U.S. 236, 247 (1959); Comcast Cellular Telecommunications Litigation, 949 F.Supp. 1193, 1201 n.2 (E.D. Pa. 1996)).

67 *See* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982) (affirming the FCC's deregulatory regime for CPE).

68 *FCC Amicus Memorandum* at 2. *See also* Illinois Bell Tel. Co. v. FCC, 883 F.2d 104, 106 (D.C. Cir. 1989) (explaining that to fulfill the federal deregulatory objective, the FCC exercised its ancillary authority over CPE to preempt inconsistent state regulation).

69 *CPE Reconsideration Order*, 84 FCC.2d at 103 ¶ 154.

70 *CCIA*, 693 F.2d at 215.

71 *CPE Reconsideration Order*, 84 FCC.2d at 103 ¶ 154.

B. Plaintiffs' Claims Concerning Special AT&T Obligations; CPE Rates and Practices; and Consumer Notification Are at Odds with the FCC's Deregulatory Regime

As we pointed out above, the FCC said that its plan allowed "AT&T to join the ranks of unregulated CPE competitors without the imposition of unwarranted burdens and restraints."[72] The FCC explicitly considered and rejected as "unwarranted burdens and restraints" many of the practices that plaintiffs' state lawsuit faults AT&T for not pursuing. Indeed, the FCC refused requests for cost-based CPE rates following the transition, continued state regulation of CPE, and additional notification requirements for embedded-base customers.[73] With regard to matters addressed by the FCC, a decision not to impose additional obligations must be viewed as a reasoned judgment that additional requirements are improper.[74] The FCC struck what it considered to be the appropriate balance with respect to all of these matters. A state court cannot now upset that balance.[75]

Yet, that is precisely what plaintiffs are asking the state court to do. Underlying most of plaintiffs' claims is the contention that the FCC was wrong in its determinations that market competition would be the best way to protect and benefit consumers, and that the FCC-required and ratified consumer notification program was sufficient. Plaintiffs seek to impose additional or different pricing and notice requirements with respect to the very embedded-base customers the FCC specifically and exhaustively addressed in its prior orders. Plaintiffs' claims thus call into

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72 *See supra* text accompanying note 45 (emphasis added).

73 *See, e.g., CPE Implementation Order*, 95 FCC.2d at 1302-05 ¶¶ 41-44, 1322 ¶ 71.

74 *See* United States v. Locke, 529 U.S. 89, 115 (2000) (quoting Charleston & Western Carolina R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915)).

75 *See* International Paper Co. v. Ouellette, 479 U.S. 479, 494 (1987) (explaining that a state law is preempted if it interferes with the methods by which a federal statute is

question many of the FCC's findings regarding the state of the CPE marketplace and the regulation necessary to protect the interests of embedded-base customers and other affected parties. Assessing damages based on plaintiffs' claims would, therefore, be at odds with, and undermine, the FCC's deregulatory regime.

1. The FCC Specifically Considered the Embedded Nature of AT&T's Customers, Determined the Appropriate Treatment of Such Customers, and Deemed that No Additional Steps Were Necessary

The FCC ruled that following the transition period, "a carrier should have the same regulatory status in marketing CPE as any other equipment vendor."[76] Indeed, the FCC said that it would "impose[] no regulatory constraints on how the Bell System may competitively provide this equipment except that it must be offered separately from the public utility operations of AT&T's affiliated carriers. The separate subsidiary is free to operate as any new business enterprise in the competitive provision of CPE."[77]

The FCC weighed the costs and benefits of continued regulation and struck a reasonable balance that is neither arbitrary nor capricious. The FCC's decision to leave CPE to the market is an affirmative regulatory decision entitled to preemptive effect because it was a reasoned

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designed to achieve its goals and upsets the federal balance of public and private interests that the federal law strikes).

[76] *CPE Final Decision*, 77 FCC.2d at 446 ¶ 159. *See also CPE Implementation Order*, 95 FCC.2d at 1325 ¶ 77, 1328 ¶ 81.

[77] *CPE Further Reconsideration Order*, 88 FCC.2d at 528-29 ¶ 47. Although the FCC initially required AT&T to operate its CPE business out of a separate subsidiary, it did so only to ensure that AT&T did not cross-subsidize its CPE business with telephone service revenues or somehow favor subscribers that used its telephones, not because AT&T had any monopoly power over the CPE market itself. *See Final Decision*, 77 FCC.2d at 388-89 ¶ 12, 452 ¶ 174 & n.64, 453 ¶ 177; *Reconsideration Order*, 84 FCC.2d at 72 ¶ 65. The FCC determined by September 1985 that the separate subsidiary was no longer necessary. *See In re* Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co., *Order*, 102 FCC.2d 655 (1985), *recon.*, *Memorandum Opinion and Order*, 104 FCC.2d 739 (1986).

determination that regulation of CPE was inappropriate and that the market should govern.[78] Plaintiffs may not seek to second-guess the Commission's determinations under state law. Thus, once the two-year transition came to an end, AT&T's CPE subsidiary was to be treated no differently than any other provider of CPE and was to have no special obligations to embedded-base customers. As the FCC said in its Amicus *Memorandum*, if any generally applicable state consumer protection and contract laws "would apply to non-telephone company vendors of CPE, they should apply equally to AT&T and Lucent."[79] It follows, therefore, that to apply any state law to AT&T differently than to any other CPE vendor is to violate the FCC's regulatory objective.

Yet this is precisely what plaintiffs ask the state court to do. They argue that AT&T was obligated to conduct its business differently from other companies operating in the competitive market because of its supposed market power and the inherited nature of its customer base.[80] The FCC determined the special obligations AT&T owed embedded-base customers. Those obligations ended with the transition period.[81] Consequently, most of plaintiffs' claims, set out primarily in paragraph 21 of their *Third Amended Complaint*, conflict with the FCC's regulatory

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78 *See* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198, 217 (D.C. Cir. 1982) (describing the FCC's decision to allow market-based rates as an "affirmative" and "comprehensive federal regulatory scheme" that requires preemption).

79 *FCC Amicus Memorandum* at 7 (emphasis added).

80 *See, e.g., Lucent's Third Supplement*, Exh. 9: TerKeurst Report, at 3-5 (TerKeurst Report) (arguing that AT&T "possessed market power" and was able "to earn extraordinary profits from the embedded consumer telephone business" because some customers "have continued to 'trust the phone company;'" "like[d] their leased telephone and [did] not want to relinquish it;" "have continued to lease because of inertia, habit, and/or apathy;" "'inherited' their leases from monopoly days;" and "have not wanted to deal with the process of purchasing [their] phone and terminating their lease").

81 *See supra* text accompanying note 27.

regime and are preempted to the extent they rely on notions that AT&T had special duties to embedded-base customers other than the ones established by the FCC, or that lasted beyond the transition period. In the following pages, Lucent identifies specifically the elements of plaintiffs' claims which demonstrate that those claims are necessarily preempted. Headings are keyed to the relevant subparagraphs of the *Third Amended Complaint.*[82]

Paragraph 21(a). Plaintiffs claim that defendants charged "unconscionably high rental charges" for their telephones. They argue that AT&T had a special obligation to charge cost-based rates to embedded-base customers.[83] As discussed above, however, the FCC specifically ruled that AT&T was entitled to charge embedded-base customers market-based rates for the lease and purchase of CPE after the transition period, just like any other CPE vendor.[84] Thus, plaintiffs' claim is expressly preempted because it seeks different treatment of AT&T than of other CPE vendors.

Paragraphs 21(b)-(e), 21(h), 21(k)-(l). Plaintiffs claim that defendants did not disclose: (b) the total dollar amount that customers had paid, and that the total amount exceeded the actual value of the equipment; (c) certain terms and conditions; (d) the original cost or current value of the telephone equipment; (e) that there were meaningful alternatives to customers available from competitors; (h) that customers could end their agreements at will; (k) changes in terms and conditions; and (l) that use or retention of leased equipment constituted acceptance of the lease

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[82] To the extent that paragraphs 60 and 77 of the *Third Amended Complaint* rely on the same theories as paragraph 21, they too have been preempted.

[83] *See, e.g., Lucent's Third Supplement*, Exh. 10: Cameron Deposition at 57-58 (Cameron Deposition) (arguing that AT&T could not charge market rates because it had market power and consumers did not have the choices one might think).

[84] *See supra* text accompanying note 27.

agreement. First of all, the information discussed in subparagraphs (e) and (h) were, in fact, provided pursuant to the FCC's transition plan requirements.[85] Second, to the extent that plaintiffs claim AT&T was obligated to provide pricing or non-pricing information that no other vendor would be obligated to provide, plaintiffs claims are expressly preempted.

Paragraph 21(j). Plaintiffs claim that AT&T collected charges in advance and retained the interest. They do not cite any rule of general applicability, however, that precludes such an arrangement. To the extent that plaintiffs claim AT&T was obligated to treat consumers differently than other CPE vendors were with respect to such practices, their claims are expressly preempted.

2. The FCC Concluded that Allowing AT&T to Charge Market-Based Rates—Including for Embedded-Base Customers—Would Better Promote Investment, Innovation, and Competition

Paragraph 21(a). Plaintiffs claim that AT&T's rates were "unconscionably high." Plaintiffs base this allegation on the mere fact that AT&T set its rates based on the market rather than cost.[86] According to plaintiffs, AT&T had market power.[87] They claim AT&T's charges are

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[85] *See CPE Implementation Order*, 95 FCC.2d at 1320 ¶ 67, 1352 ¶ 125 n.107, 1354 ¶ 131, App. B ¶¶ 1, 3, 22 (requiring AT&T to notify all embedded CPE customers of their right "to buy or continue to lease the AT&T-provided equipment" or to "terminate lease service and obtain equipment from other vendors" while continuing to receive telephone service from their current providers).

[86] *See, e.g., Lucent's Third Supplement* , Exh. 12: Class Certification Memorandum, at 6-7 (Class Certification Memorandum) (arguing that unconscionability exists where price is "excessive in relation to defendant's cost"); Exhibit 2: Alexander Deposition, at 273-77 (claiming prices became exorbitant and therefore unconscionable when AT&T set its lease charges by what the market would bear rather than cost).

[87] *See supra* note 80 and accompanying text.

actionable even absent oppressive conduct or a violation of public policy, and regardless whether consumers had alternatives.[88]

First of all, the FCC's conclusions as early as 1980 that the CPE market was highly competitive[89] belie plaintiffs' claims about market power. Second, as discussed above, the FCC regulated AT&T's lease rates during the transition period,[90] and said that AT&T could charge market-based rates thereafter.[91] Plaintiff's claims are therefore at odds with the FCC's decisions. Moreover, states are preempted from setting CPE rates by the FCC's CPE orders, as plaintiffs themselves concede.[92] Yet by seeking damages based on "reasonable rates" determined under cost-plus or rate-of-return methodologies,[93] plaintiffs in essence ask the court to retroactively impose the very rate regulation that the FCC expressly preempted. Consequently, the Illinois court is preempted from determining whether AT&T's CPE rates were reasonable. Were the court to use plaintiffs' regulatory methodologies, and determine damages based on the difference between the rate charged and the rate plaintiffs' contend was "reasonable," the court would both be determining the "reasonable" rate, and retroactively setting AT&T's CPE rate to that level.

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88 *See, e.g., Class Certification Memorandum*, at 6-7 (arguing that "an unconscionably high price alone is unlawful").

89 *See supra* note 8 and accompanying text.

90 *See supra* note 26 and accompanying text.

91 *See supra* note 27 and accompanying text.

92 *Reconsideration Motion*, at 2.

93 *See, e.g., Lucent's Third Supplement*, Exh. 13: Cameron and Kahn Disclosure Statement, at 51 (arguing that AT&T's rates were not based "on the cost of providing the equipment and service plus a reasonable profit," and proffering a variety of damage estimates based on "a reasonable lease rate" determined using factors such as "direct costs," "fully distributed costs," "general inflation rates," "nonrecurring cost," and "a 'regulated rate of return' approach"); *Cameron Deposition*, at 38, 49-51 (testifying that she was retained to "estimate the reasonable cost-based price for these sets," that AT&T's lease rates "[did] not reflect a

The rate claim is also implicitly preempted. At bottom, it is an assertion that AT&T should not have been allowed to raise rates. Thus, the claim is at odds with the FCC's determination that competition would only flourish once regulation ceased and the artificially low CPE rates were allowed to increase to permit competitive entry.

Paragraphs 21(j) and 21(m). Plaintiffs claim that AT&T impermissibly: (j) collected charges in advance and retained the interest, and (m) closed its telephone center stores. Prescription of billing practices and limitations on the discontinuance of service are examples of classic utility-type regulation. In light of the FCC's decision to eliminate utility-type regulation of CPE,[94] plaintiffs claims are expressly preempted.

3. The FCC Determined the Appropriate Level of Notification that AT&T was to Provide Embedded-Base Customers, and Concluded that No Additional Notification Was Necessary

Paragraphs 21(b)-(h), 21(k)-(l). Plaintiffs claim that defendants did not disclose: (b) the total dollar amount that customers had paid, and that the total amount exceeded the actual value of the equipment; (c) certain terms and conditions; (d) the original cost or current value of the telephone equipment; (e) that there were meaningful alternatives to customers available from competitors; (f) that consumers could continue receiving their telephone service without leasing; (g) that lease charges on the bill were for CPE; (h) that customers could end their agreements at will; (k) changes in terms and conditions; and (l) that use or retention of leased equipment signified acceptance of the lease agreement. They claim that the FCC required and ratified

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reasonable set of costs," and that she was attempting to determine "what would a regulator have allowed" AT&T to charge).

94 *See supra* note 17 and accompanying text.

program was inadequate,[95] and also rely on the FCC-required "modified negative option" as the basis for their claim of consumer fraud.[96]

First of all, as discussed above, the information in subparagraphs (e), (f), and (h), was, in fact, provided pursuant to the FCC's transition plan requirements.[97] Second, with regard to subparagraph (l), the FCC directed AT&T to treat people as lease customers if they continued to use the AT&T telephones without indicating an intent to buy.[98] Third, plaintiffs have defined the class in the lawsuit as solely those embedded customers the FCC specifically addressed in its orders and that benefited from the FCC-required and ratified consumer awareness campaign.[99] The FCC determined the information that AT&T was to provide to embedded-base customers, deemed that notification sufficient, and said that additional notification obligations were not only unnecessary, but harmful.[100] Thus, to the extent that plaintiffs argue that the FCC-designed notification program was inadequate, challenge the FCC-required modified negative option, and contend that AT&T should have provided additional information, their claims are expressly preempted.

Plaintiffs claims are also implicitly preempted. In determining the appropriate notification obligations, the FCC balanced a variety of interests, including minimizing notification costs; creating a polling procedure that did not inadvertently encourage purchase (as

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95 *See, e.g., TerKeurst Report*, at 4, 14 (claiming that the notification to the class "was misleading and deceptive in several respects").

96 *See, e.g., id.*, at 7, 14 (citing the "negative option" as evidence that "[f]rom the beginning, AT&T's lease program has been designed to take advantage of the bedded base").

97 *See supra* note 85 and accompanying text.

98 *See supra* note 35 and accompanying text.

99 *See supra* note 55 and accompanying text.

100 *See supra* note 41 and accompanying text.

opposed to lease) of AT&T equipment in favor of purchase of competing CPE; and ensuring that consumers were not stripped of a telephone merely because they failed to respond to the notification procedures. To the extent plaintiffs claims would upset that balance, they are at odds with the FCC's deregulatory regime.

V. Permitting the Claims to Proceed Would Punish Lucent for Complying with FCC Orders, Allow Plaintiffs to Circumvent the Telecommunications and Administrative Procedure Acts, and Undermine the FCC's Authority as an Expert Agency

The FCC said that carriers that provide CPE must do so pursuant to the FCC's deregulatory plan.[101] As demonstrated above, many of the claims in plaintiffs' *Third Amended Complaint* are based on conduct that AT&T engaged in pursuant to the FCC's direction. AT&T—and Lucent as its successor—not only have been required to comply with the FCC's determinations, they have reasonably relied on those requirements as the sum total of their special obligations to embedded-base customers. Thus, plaintiffs' essentially seek to subject Lucent to substantial liability for conducting business as ordered by the FCC.

The plaintiffs' claims undeniably challenge many of the FCC's determinations, but rather than directly attack the federal requirements in the appropriate forum, plaintiffs are attempting to circumvent the Communications Act's regulatory regime by pursuing stricter CPE measures under the guise of state consumer protection law. "[T]he growth of competition ha[d] provided the need and justification for detariffing," according to the FCC, and the Commission was "concerned only with arriving at the best means of achieving this result."[102] The FCC "believe[d] that [it had] fashioned workable and equitable solutions to these problems, and [had] done so by

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101 *See CPE Further Reconsideration Order*, 88 FCC.2d at 523 ¶ 33.

102 *CPE Implementation Order*, 95 FCC.2d at 1301 ¶ 38.

establishing a detariffing plan which represents the most effective means of forwarding [its] deregulatory goals."[103] Neither plaintiffs nor a state court may now second-guess that determination.

The FCC provided ample opportunity for parties to participate in multiple, lengthy CPE proceedings, and many parties did so.[104] Plaintiffs' claims should have been—and in many cases were—raised before the FCC two decades ago when the FCC was considering those issues in its proceedings on the deregulation of CPE. Plaintiffs also could have challenged the FCC regime before one of the federal appellate courts, which have exclusive jurisdiction to review FCC decisions.[105] Indeed, just such an appeal was taken with respect to the FCC's principal CPE deregulation decision.[106]

The period for direct review of the FCC's orders has long since expired. If plaintiffs wish to challenge the adequacy of the FCC's decisions or the accuracy of the Commission's predictive judgments regarding the growth of the CPE market, the Administrative Procedure Act requires that they ask the FCC to initiate a new proceeding, to seek public comment, and to issue an order with prospective effect. As for questions regarding whether AT&T met its obligations under the FCC's orders deregulating CPE, the FCC has said that it can address such grievances under its ancillary jurisdiction.[107] The Commission's complaint process was available to any consumer

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103 *Id.*. *See also id.* at 1301 ¶ 39, 1304 ¶ 43.

104 *See supra* note 6 and accompanying text.

105 *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1).

106 *See* Computer and Communications Indus. Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982).

107 *See CPE Final Decision*, 77 FCC.2d at 450-52 & n.64, ¶¶ 171-174; *CPE Implementation Order*, 95 FCC.2d at 1291 ¶ 21, 1294 ¶ 24.

who felt AT&T had not complied with the FCC's plan.[108] Plaintiffs may not, however, launch a collateral attack on the FCC's program under the guise of state consumer protection claims and seek to impose retroactive liability on vendors that complied with that program.

The United States Supreme Court recently acknowledged that, even on direct review of FCC decisions, its discretion to disturb the agency's expert judgment is narrowly circumscribed. In considering the FCC's rules regarding the unbundling of network elements, the nation's highest court said it was limited to asking "whether the Commission made choices reasonably within the pale of statutory possibility in deciding what and how items must be leased and the way to set rates for leasing them."[109] Although addressing the leasing of unbundled network elements rather than CPE, the Supreme Court's statement is particularly apropos here. It certainly would be anomalous if a state court, lacking *any* authority to review an FCC decision, were permitted to engage in a *de novo* reassessment of the wisdom of the FCC's expert determinations regarding the deregulation of CPE. The interference with the FCC's mandate that would arise from permitting lawsuits like plaintiffs' to be maintained—whether in the context of CPE, network unbundling, broadband, or any other issue governed by the FCC—should be very troubling to the agency.

Subjecting rates to piecemeal state-court determinations of appropriateness disturbs the uniformity of the FCC's national regime and its goal to develop a seamless and ubiquitous national system of interstate wireline communications.[110] Although state courts ultimately might

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108 *See CPE Implementation Reconsideration Order*, 1985 FCC LEXIS 3995, at *23-24 ¶ 21.

109 Verizon Communications Inc. v. FCC, No. 00-511, slip. op. at 69 (May 13, 2002).

110 *See* 47 U.S.C. § 151.

conclude that they are preempted from revisiting the FCC's determinations regarding market-based CPE rates and appropriate consumer notification procedures, the risk of fifty different states articulating fifty different standards will create market instability. The FCC specifically rejected that scenario in the early 1980s when it preempted states from acting independently on CPE deregulation.[111] The FCC should similarly reject that scenario now.

VI. Issuing a Declaratory Ruling Concluding that Most of Plaintiffs' Claims Have Been Preempted Is Consistent with the Decisions Entered by the Trial Court and with the FCC's Amicus Memorandum

In 1999, the record in this class action was less developed. However, plaintiffs' claims have been focussed and clarified over the intervening three years. Now that a fuller record exists, Lucent's original concerns have proved warranted, and it is time for the FCC to act. The FCC's orders regarding the deregulation of CPE and the treatment of the embedded base are the law of the land, and the FCC has an ample record upon which to determine which of plaintiffs' claims are at odds with the FCC's deregulatory regime. For these reasons, Lucent urges the FCC to issue a declaratory ruling concluding that plaintiffs' claims have been preempted to the extent that they allege: 1) that AT&T had special obligations to embedded-base customers different than those established by the FCC or that lasted beyond the transition period; 2) that AT&T was not entitled to charge embedded-base customers market-based lease rates once the transition ended; and 3) that the FCC-required and ratified consumer awareness program provided embedded-base consumers with insufficient information to be reasonably aware of their status as CPE lease customers and of their options to buy CPE. To the extent necessary, Lucent also asks

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111 *See supra* note 46 and accompanying text.

the FCC to declare that it has primary jurisdiction regarding any claims by plaintiffs that AT&T failed to meet its obligations under the applicable FCC orders deregulating CPE.

Issuance of such a ruling would be consistent with the initial trial court decision, in which the court concluded that plaintiffs' CPE rate and consumer notification claims were inconsistent with FCC orders.[112] As the court pointed out, the FCC's regime sought to leave CPE rates to market forces rather than regulation, and AT&T complied with the FCC's requirements regarding deregulation.[113] Adjudication of plaintiffs' claims would require the state court to determine "reasonable" CPE rates, and plaintiffs' seek to impose on AT&T obligations additional to and different than those that the FCC deemed appropriate. Consequently, the court correctly concluded that plaintiffs' claims were preempted.[114]

The FCC *Amicus Memorandum* is not to the contrary. Indeed, the FCC did not question the Illinois trial court's initial determination that the FCC required certain steps of AT&T that could not be challenged in a state lawsuit.[115] The FCC stated that the trial court was correct that the FCC intended to rely on market forces—not utility-type regulation—to ensure reasonable and nondiscriminatory CPE rates and practices.[116] And, although the FCC said that it did not mean to exhaustively preempt all state law of general applicability,[117] it did not say that it did not intend to preempt <u>any</u> state consumer protection law. Thus, it is consistent with the FCC *Amicus*

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112 *See Dismissal Order*, at 2-3.

113 *See id.*

114 *See id.*

115 *See* Exhibit 3: FCC Reply Memorandum, at 3-4 (challenging only the trial court's broader finding that application of state consumer protection law to any conduct in connection with AT&T's CPE offerings was completely foreclosed).

116 *See FCC Amicus Memorandum*, at 7.

117 *See id.*, at 3-4, 6-7.

Memorandum to conclude that claims that are at odds with the FCC's CPE requirements are preempted, even if cast under the guise of state consumer protection law.

Granting Lucent's petition would also be consistent with the state trial court's second order in 1999 reinstating the class action lawsuit. The court acknowledged that Lucent had filed with the FCC a petition for declaratory ruling regarding the specific impact of its preemption in this case, but said at the time that it would proceed with the trial because it did not know if and when the FCC would act.[118] Discovery and other developments in the intervening three years have provided additional information making clear that plaintiffs' claims contradict prior FCC findings of fact and conclusions of law. The court stated that if the FCC ruled on the petition for declaratory ruling, the court could act as may be appropriate.[119] For the court to recognize the FCC's prior findings is not only appropriate, it is required under the Supremacy Clause and longstanding preemption jurisprudence.

VII. Conclusion

Allowing plaintiffs' claims to proceed in the class action would unjustly expose Lucent to substantial, potential liability for following FCC orders, and would suggest that state courts can retroactively re-regulate in the future facilities and services that the FCC has chosen to deregulate. It would also set a dangerous precedent regarding preemption doctrine and harm the FCC's ability to accomplish its CPE and other policy goals. To permit the FCC's authority to be undermined in this manner would be contrary to the public interest. Issuing the requested declaratory ruling now is clearly warranted and will minimize the need for the FCC to allocate its

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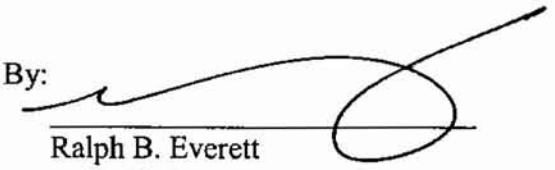
118 *See* Exhibit 1: Reinstatement Order, at 1.

119 *See* id., at 2.

scarce resources to these issues in the future as this and similar class actions spin out of control.

Accordingly, for all of the foregoing reasons, the FCC should issue a declaratory ruling concluding that all of plaintiffs' claims that are at odds with the FCC's CPE deregulation decisions have been preempted.

Respectfully submitted,
Lucent Technologies Inc.

By: 

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